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No. 84-68

Office - Supreme Court, U.S.
FILED
JUL 31 1984

ALEXANDER L. STEVENS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

KERR-McGEE CORPORATION,
Petitioner
v.
THE NAVAJO TRIBE OF INDIANS, et al.,
Respondents

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF OF AMICI CURIAE ARIZONA PUBLIC
SERVICE COMPANY AND SOUTHERN CALIFORNIA
EDISON COMPANY IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

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INTERESTS OF THE AMICI CURIAE

The Amici have extensively researched the history of Navajo tribal government, including a review of all minutes of proceedings of the Navajo Tribal Council since the date of its creation by the Department of the Interior on January 27, 1923. This research uncovered statements to the Navajo Tribal Council by the Commissioner of Indian Affairs and other federal officials, contemporaneous with Acts of Congress bearing on tribal self-government, directly related to the powers of the Navajo Tribal Council in the absence of a congressionally authorized constitution. The

Amici believe that this historical analysis will assist this Court in understanding the extent to which that portion of the opinion of the lower court upholding the lawfulness of Navajo tax ordinances absent their approval by the Secretary of the Interior constituted a departure from the long-standing views of Congress and the Executive Branch regarding the supervisory powers of the Secretary of the Interior over ordinances adopted by the Navajo Tribal Council.

Amicus Arizona Public Service Company is the project manager of the Four Corners Generating Station, a coal-fired electric generating facility owned by Arizona Public Service Company, Tucson Electric Power Company, Public Service Company of New Mexico, Southern California Edison Company, El Paso Electric Company, and Salt River Project Agricultural Improvement and Power District. The co-owners of that facility purchase coal for its operation from Utah International, Inc., a non-Indian coal supplier whose mining operations are conducted on the Navajo Reservation. Pursuant to the fuel supply contract with Utah International, the co-owners are obligated to pay, as an element in fuel costs, lawful taxes imposed by governmental authorities.

Amicus Arizona Public Service Company is also sole owner of the Cholla Generating Station, a coal-fired electric generating facility. Arizona Public Service Company purchases coal to operate this facility from Pittsburg and Midway Coal Company, a non-Indian coal supplier whose mining operations are conducted on the Navajo Reservation, under a fuel supply contract obligating the utility to pay, as an element in fuel costs, lawful taxes imposed by governmental authorities.

Amicus Southern California Edison Company is the project manager of the Mohave Generating Station, a coal-fired electric generating facility owned by Southern California Edison Company, Salt River Project Agricultural Improvement and Power District, Nevada Power Company, and the Department of Water and Power of the City of Los Angeles. The co-owners purchase coal to operate this facility from

Peabody Coal Company, a non-Indian coal supplier whose mining operations are conducted on the Navajo Reservation. Again, under the fuel supply contract for this facility, the co-owners are obligated to pay lawful taxes imposed by governmental authorities as an element of fuel costs.

The Navajo Tribal Council has enacted a Possessory Interest Tax ordinance and a Business Activity Tax ordinance, each of which is applicable to persons conducting business within the Navajo Reservation, including each of the above referenced coal suppliers. Each of the utilities named above is directly affected by these tax ordinances by virtue of the fuel supply contracts with their respective coal suppliers. In addition, because the costs incurred by these utilities, including taxes, generally are costs taken into account in the establishment of rates charged to consumers of electricity in the areas served by them, these tax ordinances indirectly affect the consumers of electricity in the States of Arizona, California, Nevada, New Mexico and Texas.

The amici submit that the petition for a writ of certiorari filed by Kerr-McGee Corporation should be granted to review that portion of the lower court's opinion holding that tax ordinances of the Navajo Tribal Council are effective without the approval of the Secretary of the Interior. The opinion of the lower court is at direct variance with this Court's opinion in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and wholly inconsistent with the longstanding views of Congress and the Executive Branch regarding the supervisory powers of the Secretary of the Interior over ordinances adopted by the Navajo Tribal Council.

ARGUMENT

I. INTRODUCTION

The holding of the lower court that the two tax ordinances in question are effective, even absent the approval of the Secretary of the Interior, rests upon two fundamental (albeit unarticulated) and equally erroneous propositions:

- 1) That the Navajo Tribe without following procedures established by Congress for implementing tribal self-

government (and indeed, having rejected at least two invitations to pursue them) may nevertheless exercise the full measure of a retained power of inherent sovereignty free of supervision by the Secretary, and

2) That the Navajo Tribal Council is the body duly constituted and empowered to exercise sovereign powers for and on behalf of members of the Tribe, and free of supervision by the Secretary.

When these two bases for the lower court's decision are viewed in the light of the historical record concerning the tribal government reform movement, it can readily be seen that the lower court has declared two separate congressional enactments to have been wholly superfluous legislative exercises, and has imposed upon members of the Navajo Tribe a governing body never constituted by them.

II. HISTORY DEMONSTRATES THAT SECRETARIAL APPROVAL OF NAVAJO TRIBAL COUNCIL ORDINANCES IS ESSENTIAL TO THEIR EFFECTIVENESS.

A. The History of Navajo Tribal Government Demonstrates That The Navajo Tribal Council Has Not Been Empowered to Exercise Governmental Power Over Non-Indians Absent Secretarial Approval.

The Navajo Tribal Council is not the child of the Navajo people but, rather, was created by, and continues to exist by the authority of, regulations promulgated by the Secretary of the Interior. The Navajo people have never empowered the Navajo Tribal Council to exercise whatever sovereign powers might be possessed by the Navajo people, despite repeated attempts by Congress and the Executive Branch to encourage them to do so. The history of Navajo tribal government conclusively demonstrates that the Navajo Tribal

Council has never been empowered to enact legislation free of supervision and control by the Secretary of the Interior.¹

Until the first years of the Twentieth Century, the Navajo people did not have or recognize any tribal government which could speak for and bind all members of the Navajo Tribe. The fundamental, organic law of the Navajo people was embodied in the culture, traditions, customs and institutions comprising Navajo society which, in turn, was organized into inter-cooperating groups based on family relationships. *Plural Society* at 169-172. Navajo tradition and custom did not recognize any coercive power in the leadership of any group or in the group itself. Order was maintained and decisions of the group were enforced by argument, persuasion, urging and peer pressure. Delegation of power or authority to one Navajo or to a group of Navajos to supervise or direct the conduct of other Navajos was unknown and contrary to the culture, traditions, customs and institutions of the Navajo people. *A Political History* at 48-49, 91.

The dawn of "tribalism" on the part of the Navajo people has been traced to increased interest in the mineral deposits within the Navajo Reservation, paralleling the enactment by Congress of a series of statutes relative to the exploitation of mineral resources within Indian reservations. *A Political History* at 53-58. Under the pattern of legislation that

¹ The history of Navajo tribal government and the role of the Secretary of the Interior in managing the affairs of the Navajo Tribe is fully set forth in the writings of Dr. Robert W. Young. The principal writings of Dr. Young include: "The Origin and Development of Navajo Tribal Government," *The Navajo Yearbook, Report No. viii, 1951-1961 A Decade of Progress* 371 (1961), an official publication of the Department of the Interior prepared in conformance with the Navajo-Hopi Rehabilitation Act (hereinafter "Navajo Yearbook"); "The Rise of the Navajo Tribe," *Plural Society in the Southwest* 167 (E. Spicer and R. Thompson 1972) (hereinafter "Plural Society"); and *A Political History of the Navajo Tribe* (1978) (hereinafter "A Political History"). *The Navajo Yearbook* has been cited by this Court as an authoritative source on Navajo tribal government. See *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965); *Williams v. Lee*, 358 U.S. 217 (1959).

existed in the early 1920's, mineral leases were permissible if entered into by the authority of a "council" speaking for the affected Indian tribe. *See, e.g.*, 25 U.S.C. §398. The absence of any recognized council authorized to speak on behalf of the Navajo Tribe caused a disruption in the manner in which the Department of the Interior supervised and managed the exploitation of mineral resources within the Navajo Reservation. *Navajo Yearbook* at 373-375.

After a period of confusion, on January 27, 1923, the Department of the Interior promulgated "Regulations Relating to the Navajo Tribe of Indians," which stated at section 3 that there "shall be created a continuing body to be known and recognized as the 'Navajo Tribal Council' with which administrative officers of the Government may directly deal in all matters affecting the tribe." *Navajo Yearbook* at 393. The 1923 Regulations, as revised from time to time, created a continuing body—not a governing body—and its purpose was very limited.² *Tribal government functioned under the supervision and control of the Secretary.*

On April 21, 1933, John Collier was appointed Commissioner of Indian Affairs. This appointment, echoing the era of the New Deal insofar as it pertained to Indian relations, brought changes in the approach of the federal government to the supervision of Indian tribes. This new approach was embodied in the Wheeler-Howard Act, also known as the

² "It must be noted that under the Regulations and pursuant to Federal policy in the 1920s, the Council thus created, not by the Navajo people but by the Secretary of the Interior, was *not*, in fact or in function, to be construed as a *governing body*. Nowhere in the Regulations was there any specific mention of tribal authorities or tribal powers. The Council could vote 'on all matters coming before it'—presumably to accept or reject them in the name of the Tribe, but the Regulations recognized no legislative powers in the Council, nor did they fix any executive authorities in the Council Chairman. The regulations opened no avenues through which the Tribe could *initiate* action for the benefit of the Navajo public." *A Political History* at 62 (emphasis in original). *See also A Political History* at 69.

Indian Reorganization Act, enacted by Congress on June 18, 1934. Generally, 25 U.S.C. §461 *et seq.*

The Indian Reorganization Act was not to apply to any reservation if a majority of the adult Indians voted against the application of the Act at a special election called by the Secretary of the Interior. 25 U.S.C. §478. Acceptance of the Act by the Navajo people was a matter of importance to the federal government. In early 1934, representatives of the Department of the Interior, including Commissioner Collier, visited Indian tribes throughout the United States to secure their preliminary approval of the principal features of the bill then pending in Congress. *See Cohen, Federal Indian Law* 129 (Revised by United States Interior Department 1958). Several meetings were held with the Navajo Tribal Council. Because contemporaneous constructions of the Indian Reorganization Act by officials of the Department of the Interior are persuasive and deserve the respect of courts interpreting its effect, *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982), a recital of statements by federal officials contemporaneous with enactment of the Indian Reorganization Act is essential to an understanding of the issue brought before this Court.³

³ This Brief sets forth excerpts from the minutes of meetings of the Navajo Tribal Council. Under the 1923 Regulations, which, with certain amendments, continued in effect until 1938, meetings of the Council were held at a time and place designated by the Commissioner of Indian Affairs, no meeting of the Council could be held without the presence of an official of the United States designated by the Commissioner of Indian Affairs, and the designated official was directed to keep a record of the proceedings of all Council meetings, with the original record of the proceedings being forwarded to the Commissioner of Indian Affairs. *See Navajo Yearbook* at 393-400. Under the 1938 Rules (*Infra* at 10), which were amended as late as 1966, meetings of the Council were called by the Commissioner of Indian Affairs upon request of the Executive Committee of the Council, and the Chairman of the Council was directed to make a proper record of the proceedings of all Council meetings. *See Navajo Yearbook* at 407-411. Thus, the minutes of meetings of the Navajo Tribal Council, being both authorized and required by federal regulations, constitute public records.

On March 12, 1934, Commissioner Collier met with the Navajo Tribal Council and, in explaining the advantages that might be derived from the self-government provisions of the bill then pending in Congress, described the then status of Navajo tribal government as follows (emphasis added):

The Navajo Tribe has a Tribal Council and that Council meets and works in a regular way. And you all know that it is the policy of Secretary Ickes and myself for the Tribal Council to have all the power and build itself up in a great freedom. But if we had a different policy and wanted to smash your Tribal Council, destroy it, we could do it in one day. We could take away every bit of your authority and we could deny everyone of you to sit in the council and do it as arbitrarily as we wanted to. If your present Council were in disagreement with us, we could abolish that Council and appoint a new Council, hand picked, so every member of it would be our rubber stamp and do exactly as we told him. We could, if we wanted to, adopt a rule that prohibited you from meeting more than once every five years and you would have to obey it. Or if we wanted to be real devilish, we could adopt a rule that to be a member of the Tribal Council, you had to attend a meeting every day at Fort Defiance, otherwise you were not a member.

In other words, your self-government in the most important matters is simply a matter of what the Secretary of the Interior wants you to have. He can take it away whenever he gets ready. If I wanted, myself, to dispose of your oil property in some way you did not like, I could tell you that either you would be abolished or you were going to give me unlimited power to sign away your oil property and I would have the power to do it.

Now, that is the condition under which practically all of the Indians are living now, at the mercy of the Secretary and the Commissioner. There are a few exceptions, as in the case of most of the New Mexico Pueblos and the Osages of Oklahoma. They have certain rights under statute law, but otherwise the Indians are all situated like you are. Now what we are seeking in this Title

One is to cure that situation and to place you where you will not be at the mercy of the Secretary of the Interior and the Commissioner of Indian Affairs. And by that I mean we want to give you the power so if you do not want to be at our mercy you won't have to be. If you want to stay at our mercy, you can stay there, but if you don't want to, you don't have to.

Minutes of the Special Session of the Navajo Tribal Council, 6-7, held at Fort Defiance, Arizona, March 12, 1934.

On April 9, 1934, Mr. J. M. Stewart, a subordinate of Commissioner Collier, once again met with the Navajo Tribal Council to discuss the self-government provisions of the bill then pending in Congress, and answered questions from members of the Council in the following manner:

Q. Do we have any power now as a nation?

A. Not under existing law, no.

* * *

Q. It seems that we have a voice in a lot of matters we have already undertaken, such as the council election. We have a voice in the election of our head men. These have been recognized by the people.

A. You have been allowed to have a council, hold your elections, etc., and Washington has sent representatives to talk with you, consult with you, get your views on things, but in the last analysis, the last showdown, it is the Bureau in Washington that issues the orders to the superintendents, and the superintendents issue those orders to the Indians. You have no authority under the present set-up.

* * *

Q. Isn't it possible that the Navajos can get by without a charter?

A. Of course, any Indian tribe can get by without it.

Q. I mean and still have power.

A. No, in order to get the benefits, educational and other, there must be a charter granted.

Minutes of the Special Session of the Navajo Tribal Council, 24, 27, held at Crownpoint, New Mexico, April 9, 1934.

In an election held on June 17, 1935, the Navajo people rejected the application of the Indian Reorganization Act by a vote of 7,992 to 7,608. *Navajo Yearbook* at 377. As a result, the Tribal Council continued to exist by virtue of the 1923 Regulations, as amended. *Tribal government continued to function under the supervision and control of the Secretary.*

In the face of the rejection of the Indian Reorganization Act by the Navajo Tribe, Commissioner Collier went forward with attempts to reorganize the Tribal Council through administrative proceedings and amendments to federal regulations. The result of this attempt was the convening of a constitutional assembly in April, 1937, consisting of tribal delegates from throughout the Navajo Reservation. The intent and purpose of this constitutional assembly was to organize itself and declare itself to be the Navajo Tribal Council, and thereafter seek its approval by the Secretary of the Interior and Congress as the authorized body entitled to speak for the Navajo people. Although a draft of a proposed constitution was prepared by the constitutional assembly and submitted to the Secretary for approval, this draft of a constitution was never placed into effect in any manner whatsoever.⁴ See generally *Navajo Yearbook* at 376-82; *A Political History* at 91-98, 106-108.

On July 26, 1938, the Secretary promulgated "Rules for the Tribal Council." The 1938 Rules provided only the barest framework for organization of Navajo tribal government. Although the Navajo Tribal Council was designated as the "governing body of the Navajo Tribe," the extent of its power was not described. *Navajo Yearbook* at 407-411.

⁴ Commissioner Collier recommended secretarial approval of this constitutional assembly, justifying the ultimate result on the theory that the Navajo Tribal Council, as existing or as reorganized, would be an institution created by the Secretary with authorities derived from regulations promulgated by the Department of the Interior. Memorandum dated March 23, 1937, from Commissioner Collier to the Secretary of the Interior, cited in *Navajo Yearbook* at 381. Thus, even if the efforts of the constitutional assembly had been successful, the Tribal Council created thereby would have functioned under the supervision and control of the Secretary.

*Tribal government continued to function under the supervision and control of the Secretary.*⁵

The status of Navajo tribal government after rejection of the Indian Reorganization Act is illustrated by a statement made in 1948 before the Navajo Tribal Council by Mr. J. M. Stewart, then Superintendent, in response to an inquiry from a Council member on the powers of the Council (emphasis added):

Mr. Stewart: I will try to answer Joe to the best of my ability. As a matter of comparison let us take the Congress of the United States. It can enact legislation, but the legislation is not effective unless approved by the President, except under certain conditions. And so it is with the Navajo Tribal Council. It can enact, if you wish, ordinances or resolutions, but it cannot put those into effect unless approved by the Secretary of the Interior or Commissioner of Indian Affairs. . . .

• • •

Now to answer Joe very directly. My personal feeling and understanding is that *the Navajo Tribal Council does not have the authority to demand. It has only the authority to request.*

Minutes of Proceedings of the Meeting of the Navajo Tribal Council, 29-30, held at Window Rock, Arizona, June 26-29, 1948.

The rejection of the Indian Reorganization Act by the Navajo people effectively negated the existence of any congressional authorization for a procedure whereby the Navajo

⁵ "[A]side from controlling personal relations, the Council has few powers of an autonomous governing body. Most action it takes is initiated by the government, and its functions are mainly to approve or disapprove government proposals or to advise with administrators, rather than to initiate policy or pass laws. Furthermore, any actions which it takes that are deemed not in the best interests of The People can be disapproved by the Secretary of the Interior. Thus the Council can bring pressure on administrators, but actual legislation and administration are still largely in the hands of the Indian Service. These limitations stem primarily from the tribal rejection of the Indian Reorganization Act in 1934 [sic]." Clyde Kluckhohn & Dortha Leighton, *The Navajo* 102 (1946).

Tribe could free itself from complete supervision and control by the Secretary. In response to this situation, the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. §631 *et seq.*, included an authorization for the Navajo people to adopt a tribal constitution by majority vote of adult members of the Tribe. 25 U.S.C. §636. ⁶ The Navajo people have not adopted a constitution pursuant to this congressional authorization. As late as 1968, the Navajo Tribal Council formulated a constitution and adopted a resolution calling for its submission to the Navajo people for their approval, but no such action was ever taken and the perceived need for a tribal constitution remains unsatisfied. *Minutes of Sessions of the Navajo Tribal Council*, held at Window Rock, Arizona, November 14, 1968.

The 1938 Rules, with a number of amendments approved by the Secretary of the Interior, continue as the basis for the present Navajo tribal government. *Navajo Yearbook* at 384, 387; *A Political History* at 114. Thus, the 1938 Rules pertaining to tribal elections were revised on several occasions, and in each instance these revisions were submitted to the Secretary of the Interior for approval prior to their effectiveness. *Navajo Yearbook* at 387, 412, 419; *Plural Society* at

⁶ Although the Navajo-Hopi Rehabilitation Act mentions the Navajo Tribal Council, 25 U.S.C. §§635, 636, 637, 638, the Act does not recognize any independent governmental power in the Navajo Tribal Council, either directly or by implication. Indeed, with the exception of provisions dealing with land, 25 U.S.C. §635, all other provisions of the Act recognize the continuing supervision of the Navajo Tribe by the Secretary of the Interior. Thus, although the Act authorized the Navajo Tribal Council to formulate a constitution, the constitution could be effective only after a vote of the Navajo people in a secret ballot election conducted under regulations prescribed by the Secretary. 25 U.S.C. §636. Similarly, although the Act authorized the Tribal Council to designate the manner of expenditure of tribal funds, such expenditure continued to require the approval of the Secretary. 25 U.S.C. §637. Finally, although the Act required that the Tribal Council be kept informed and afforded the opportunity to participate in the rehabilitation program authorized by the Act, the Secretary was directed to follow any recommendation of the Council only when "he deems them feasible and consistent with the objectives" of the Act. 25 U.S.C. §638.

215-216. Equally instructive is the manner in which the Navajo Tribe adopted its law and order code.

On June 2, 1937, the Secretary of the Interior approved a law and order code applicable on Indian reservations. 25 C.F.R. Part 11 (1977). For many years these regulations applied in full to the Navajo Tribe. At times relevant to this discussion, 25 C.F.R. §11.1 stated, in part, as follows:

(a) The regulations in this part relative to Courts of Indian Offenses shall apply to all Indian reservations on which such courts are maintained.

* * *

(d) The regulations in this part shall continue to apply to tribes organized under the [Indian Reorganization Act] until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective . . .

(e) Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe.

Because the members of the Navajo Tribe never adopted a constitution under the Indian Reorganization Act, the Navajo Tribe was unable to substitute its own law and order code pursuant to 25 C.F.R. §11.1(d). Nevertheless, the Navajo Tribe sought to assume responsibility for the administration of law and order on the Navajo Reservation pursuant to 25 C.F.R. §11.1(e).

On January 6, 1959, the Navajo Tribal Council adopted Resolution CJA-1-59, entitled "Adopting as tribal law the law and order regulations of the Department of the Interior on a temporary basis," which was approved by the Secretary of the Interior on February 11, 1959, and which stated, in part:

1. Pending the adoption by the Navajo Tribe and approval thereof by the Secretary of the Interior of a permanent law and order code, the law and order regulations of the Department of the Interior, 25 C.F.R., as

modified, amended or amplified by ordinance and resolutions of the Navajo Tribal Council, heretofore approved by the Secretary of the Interior, are hereby adopted as tribal law, . . .

* * *

3. Except in Sections 11.1(e), 11.2(d) and 11.26, whenever the titles Secretary of the Interior, Commissioner of Indian Affairs, or Superintendent appear, the title Chairman of the Navajo Tribal Council is substituted therefor.

Section 1 of Resolution CJA-1-59 incorporated the law and order regulations of the Department of the Interior as modified, amended or amplified by resolutions of the Tribal Council *heretofore* approved by the Secretary. By specifically providing that the title "Secretary of the Interior" would remain in Section 11.1(e) after adoption of the federal regulations as tribal law, the Secretary reserved his authority to approval all *future* resolutions of the Tribal Council.⁷

B. The Navajo Tribe has Failed to Follow the Procedure, Twice Delineated by Congress, Necessary to Free Itself From Federal Control and to Exercise Powers of Self Government.

It is beyond dispute that both the Indian Reorganization Act of 1934, generally 25 U.S.C. §461 *et seq.*, and the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. §631, *et seq.*, were intended by Congress, and viewed by the Secretary, as remedial measures enacted to foster tribal self-government by providing the means by which tribes, by adopting a constitution, could not only free themselves from

⁷ In *Oliver v. Udall*, 306 F.2d 819 (D.C. Cir. 1962) *cert denied*, 372 U.S. 908 (1963), the court held that approval of Resolution CJA-1-59 by the Secretary was a valid exercise of the Secretary's authority under 25 C.F.R. §11.1(e). The court's broad assertion that the action of the Secretary constituted his consent to the supersession of 25 C.F.R. Part 11, a correct statement insofar as pertinent to the decision in that case, clearly is incorrect to the extent it implies a complete relinquishment by the Secretary of his authority over future resolutions adopted by the Council, an implication clearly denied by Section 3 of Resolution CJA-1-59.

absolute domination by the Department of the Interior, but also "stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, power." S. Rep. No. 1080, 73rd Cong., 2d Sess., 1 (1934). The opinion of the lower court makes a mockery of this congressional purpose.

In the Indian Reorganization Act, Congress established a procedure for Indian tribes to follow in order to free themselves from federal domination and control and to exercise powers of self government. In Section 6 of the Navajo-Hopi Rehabilitation Act, 25 U.S.C. §636, Congress specifically established the procedure for the Navajo Tribe to follow in order to achieve self-government. The reasoning of the Ninth Circuit makes both of these acts not only superfluous legislative exercises, but hypocritical acts which achieve the exact opposite of their stated purpose.

Under the lower court's reasoning, the only tribes that benefited from the Indian Reorganization Act were those tribes that refused to adopt a constitution as permitted by the Act; these tribes, and only these tribes, remain free from federal control. Under this reasoning, Indian tribes which adopted a constitution under the Indian Reorganization Act did not free themselves from federal domination but, rather, imposed upon themselves federal constraints that previously did not exist under the law. The lower court's message is clear: Indian tribes which elected to participate in an historic Indian law reform movement by adopting a constitution under the Indian Reorganization Act were duped by two branches of the federal government—legislative and executive—into *surrendering* rights under the guise that they were *acquiring* rights. For example, the Jicarilla Apache Tribe in *Merrion*, *supra*, which adopted a constitution authorizing the tribe to tax non-Indians only with the approval of the Secretary of the Interior, is viewed as giving away an aspect of its independence by doing so. Viewed from the historical perspective the Ninth Circuit's analysis simply doesn't make sense.

Neither the Indian Reorganization Act nor the Navajo-Hopi Rehabilitation Act requires the adoption of a constitution by any Indian tribe. Furthermore, neither the Indian Reorganization Act nor the Navajo-Hopi Rehabilitation Act creates tribal sovereign powers. However, both of these Acts have been described as regulating "the manner and extent of the tribal power of self-government." See *United States v. Wheeler*, 435 U.S. 313, 328 (1978). The determination that these Acts neither *require* the adoption of a constitution nor *create* tribal sovereign powers does not compel the conclusion that Indian tribes may, without reference to the *procedure* set forth in these Acts, exercise unfettered powers of self-government, applicable to Indians and non-Indians alike, free of federal supervision and control. Indeed, the history of Navajo tribal government, particularly by reference to statements to the Navajo Tribal Council by the Commissioner of Indian Affairs and other federal officials, both before and after the adoption of the Indian Reorganization Act, compels the contrary conclusion. See Section II.A., of this Brief, *supra*.

C. The Ninth Circuit Has, in Effect, Created a Governmental Authority Authorized to Exercise the Inherent Sovereign Powers of the Navajo People Without Their Consent.

In the face of the Navajo Tribe's refusal to organize itself and to adopt a constitution, as permitted by Congress, the Ninth Circuit has taken it upon itself to appoint the Navajo Tribal Council as the tribal government by judicial fiat. The members of the Navajo Tribe, however, have never invested the Navajo Tribal Council with any governmental power. The Council began as, and continues to exist as, a creature of federal regulations.

The amici are unable to identify any event that transformed the Navajo Tribal Council from an agency created by federal regulations promulgated by the Secretary for the administrative convenience of the Department of the Interior into an agency empowered to exercise the sovereign powers of the Navajo people free of federal supervision and

control.⁸ The opinion of the lower court necessarily is based upon the theory that a tribal government capable of exercising sovereign powers free of federal supervision and control can give birth to itself by evolution or public perception—a sort of political Darwinism—without congressional authorization. This theory is contrary to a fundamental principle of American jurisprudence: "In this Nation each sovereign governs only with the consent of the governed." *Nevada v. Hall*, 440 U.S. 410, 426 (1979), *reh'g denied*, 441 U.S. 917 (1979).

The petition for a writ of certiorari should be granted to rectify the lower court's unwarranted departure from the long-standing views of Congress and the Executive Branch regarding the supervisory powers of the Secretary of the Interior over ordinances adopted by the Navajo Tribal Council.

⁸ This Court has on occasion alluded to Navajo tribal government, but the Court has never addressed the fundamental issues presented by the petition for a writ of certiorari. In *United States v. Wheeler*, 435 U.S. 313 (1978), this Court noted that both the Indian Reorganization Act and the Navajo-Hopi Rehabilitation Act authorized the Navajo Tribe to adopt a constitution for self-government, but there is no indication that the Court was aware that the Navajo people have never adopted a constitution under either statute. In *Williams v. Lee*, 358 U.S. 217 (1959), this Court pointed to the Indian Reorganization Act and the Navajo-Hopi Rehabilitation Act as congressional encouragement for the formation of tribal government and found implicit in treaties between the Navajo Tribe and the United States "the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed," *Id.*, 358 U.S. at 221-2, but the Court at no time gave recognition to the failure of the Navajo people to adopt a constitution pursuant to either of these statutes; the reference to "whatever tribal government existed" cannot be stretched, by any theory of the elasticity of the English language, to encompass a recognition by the Court that the Navajo Tribal Council may exercise the sovereign powers of the Navajo people free of federal supervision and control.

III. THE DECISIONS OF THIS COURT REQUIRE FEDERAL APPROVAL OF TRIBAL TAX ORDINANCES APPLICABLE TO NON-INDIANS

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court upheld a tax ordinance enacted by the Jicarilla Apache Tribe, and approved by the Secretary of the Interior, pursuant to a provision in the Tribe's constitution adopted under the Indian Reorganization Act with the approval of the Secretary.⁹ The adoption of a constitutional provision authorizing the tax before its imposition was viewed by the Court as "the critical event necessary to effectuate the tax." *Id.*, 455 U.S. at 148, n. 14 (emphasis in original). The Court recognized that a requirement of secretarial approval of tribal tax ordinances applicable to non-Indians served to "minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies." *Id.*, 455 U.S. at 141. The Court referred to the two-stage approval process as "a series of federal check-points that must be cleared before a tribal tax can take effect" and a "process established by Congress to monitor such exercises of tribal authority." *Id.*, 455 U.S. at 155. The opinion of the lower court upholds tribal taxation of non-Indians without regard to secretarial approval and sanctions the imposition of tribal taxes on non-Indians

⁹ Unlike the members of the Jicarilla Apache Tribe, the Navajo people have never adopted a constitution vesting in the Navajo Tribal Council the right to exercise their sovereign powers. Furthermore, unlike the resolutions at issue in *Merrion*, the tax ordinances of the Navajo Tribal Council have never been approved by the Secretary of the Interior.

without the minimal protection afforded to the taxpayers in *Merrion*.¹⁰

The opinion of the lower court is directly contrary to the prior decisions of this Court. The petition for a writ of certiorari should be granted to rectify this unwarranted departure from existing precedent.

IV. CONCLUSION

The opinion of the lower court raises critical policy issues affecting the exercise of powers of self-government by every Indian tribe in the United States. For an Indian tribe adopting a constitution under the Indian Reorganization Act, the opinion creates a clear incentive to rescind that constitution, thereby eliminating any requirement that tribal ordinances be approved by the Secretary of the Interior. For an Indian tribe not adopting a constitution under the Indian Reorganization Act, the opinion creates a clear disincentive to organize under congressional authorization and gives rise to an atmosphere of lawlessness in which no person, Indian or non-Indian, is able to ascertain either the source of authority for the enactment of tribal ordinances or the existence of any limitations on the exercise of that authority.

¹⁰The *Merrion* decision's requirement of secretarial approval is consistent with all prior decisions of this Court, and all lower federal court decisions cited with approval by this Court, relative to tribal taxation of non-Indians. In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), *reh'g denied*, 448 U.S. 911 (1980), tribal tax ordinances were approved by the Secretary of the Interior. In *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F., 947 (8th Cir. Indian Terr. 1905), *appeal dismissed*, 203 U.S. 599 (1906), the tribal enactment at issue was authorized by the Curtis Act of June 28, 1898, Ch. 517, 30 Stat. 495, which specifically provided that tribal enactments were not effective until approved by the President of the United States. In *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956), and *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959), the Oglala Sioux Tribe had implemented its sovereign taxing power by adoption of a constitution approved by the Secretary of the Interior pursuant to the Indian Reorganization Act.

Respectfully submitted this 30th day of July, 1984.

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No. 84-68

IN THE
 SUPREME COURT OF THE UNITED STATES

October Term, 1984

KERR-McGEE CORPORATION,

Petitioner

v.

THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents

CERTIFICATE OF SERVICE

Robert B. Hoffman hereby certifies:

1. That he is an active member of the Bar in this Court and that he is an attorney for the amici curiae Arizona Public Service Company and Southern California Edison Company.

2. That the Brief of Amici Curiae to which this Certificate is attached has been served upon all counsel of record in accordance with the provision of Rule 28 of the Rules of this Court, by placing three copies of the same in the United States mail, first class postage prepaid, properly addressed this 30th day of July, 1984 to each of:

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3. That the foregoing represents service on all parties required to be served under the provision of Rule 28 of this Court.

/s/ ROBERT B. HOFFMAN
Robert B. Hoffman